

Rule 1.16: Declining or Terminating Representation

1. Current Kentucky Rule with Official Comments:

SCR 3.130(1.16) Declining or terminating representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) The representation will result in violation of the Rules of Professional Conduct or other law;
- (2) The lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) The lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

- (1) The client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (2) The client has used the lawyer's services to perpetrate a crime or fraud;
- (3) The client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
- (4) The client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (5) The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (6) Other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned.

Supreme Court Commentary

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to represent himself.

[6] If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client. See Rule 1.14. **Optional Withdrawal**

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on a repugnant or imprudent objective.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law.

[10] Whether or not a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawing or being discharged by the organization's highest authority is beyond the scope of these Rules.

2. Proposed Kentucky Rule with Official Comments:

SCR 3.130(1.16) Declining or terminating representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) ~~The~~ the representation will result in violation of the Rules of Professional Conduct or other law;

(2) ~~The~~ the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) ~~The~~ the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client, ~~or if;~~

~~(1)~~ (2) ~~The~~ the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

~~(2)~~ (3) ~~The~~ the client has used the lawyer's services to perpetrate a crime or fraud;

~~(3)~~ (4) ~~The~~ the client insists upon ~~pursuing an objective~~ taking action that the lawyer considers repugnant or ~~imprudent~~ with which the lawyer has a fundamental disagreement;

~~(4)~~ (5) ~~The~~ the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

~~(5)~~ (6) The the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

~~(6)~~ (7) Other other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

~~Supreme Court Commentary~~ Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer

withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may ~~wish~~ request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring ~~the client to represent himself~~ self-representation by the client.

[6] If the client ~~is mentally incompetent~~ has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and, ~~in an extreme case,~~ may initiate ~~proceedings for a conservatorship or similar protection of the client.~~ See take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not

required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on a taking action that the lawyer considers repugnant or imprudent objective with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. ~~The lawyer may retain papers as security for a fee only to the extent permitted by law.~~ A lawyer must return the client's file, papers, and property after termination if the client requests the file. The lawyer may retain a copy of the file. A lawyer may charge a reasonable copying charge, but may not condition return of a client's files, papers, and property upon payment of the copying charge, unless the lawyer has previously provided a copy, either during the representation or after cessation of the representation. A lawyer must make one copy of the file and materials available to the client even without payment if the client's interests will be substantially prejudiced without the documents.

[10] The lawyer may not condition return of the client's file, papers, and property upon payment of a fee. KRS 376.460 gives a lawyer the right to have payment of fees secured by a judgment the client recovers as a result of the lawyer's efforts. However, a lawyer may withhold uncompensated work product from the client's returned files (e.g., draft of pleadings, agreements and the like), unless the client's interests will be substantially prejudiced without the uncompensated work product. Documents or other relevant evidence, the original or its equivalent that may be required for trial preparation or as evidence for trial or in other legal proceedings, must be surrendered in their original form. See Rule 1.15 for guidance on resolving disputed claims for client funds.

~~[10] Whether or not a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawing or being discharged by the organization's highest authority is beyond the scope of these Rules.~~

3. Discussion and Explanation of Recommendation:

a. Comparison of proposed Kentucky Rule with its counterpart ABA Model Rule.

(1) The proposed KRPC 1.16 adopts all MR 1.16 changes and adds to Comment [10] information about the limited right Kentucky lawyers have to withhold only uncompensated work product from returned files when the lawyer is discharged. Comment [10] of current KRPC 1.16 is deleted because its meaning is unclear. The proposed Comment [9] includes guidance on charging for copying costs. These Comments implement the guidance of KBA E-395 (1995).

(2) The ABA Reporter's Explanation of Changes otherwise expresses the Committee's view. It is adopted by the Committee for purposes of explaining recommended changes and is quoted below.

- ABA -- Reporter's Explanation of Changes -- Model Rule 1.16

TEXT:

1. Paragraph (b): Clarify significance of permission to withdraw "without material adverse effect on the interests of the client"

No change in substance is intended. This proposal is intended to clarify that the lawyer may withdraw for any reason if "withdrawal can be accomplished without material adverse effect on the interests of the client," or, even if there will be such material adverse effect, if the lawyer has good cause, as set forth in paragraphs (b)(2) through (6).

2. Paragraph (b)(4): Alter requirement for permissive withdrawal when client and lawyer disagree over course of representation

a. Substitute "taking action" for "pursuing an objective"

The Commission recommends that a lawyer be permitted to withdraw from representation whenever a client is insisting that the lawyer take action that the lawyer finds repugnant or, in some instances, when the lawyer has a fundamental disagreement with the action proposed by the client, regardless of whether the action concerns the client's objectives or the means of achieving those objectives.

b. Substitute "with which the lawyer has a fundamental disagreement" for "imprudent"

Allowing a lawyer to withdraw merely because the lawyer believes that the client's objectives or intended action is "imprudent" permits the lawyer to threaten to withdraw in order to prevail in almost any dispute with a client, thus detracting from the client's ability to direct the course of the representation. Nevertheless, the Commission believes that a lawyer ought to be permitted to withdraw when the disagreement over objectives or means is so fundamental that the lawyer's autonomy is seriously threatened.

3. Paragraph (c): Remind lawyers of court requirements of notice or permission to withdraw from pending litigation

Some courts require only that the lawyer notify the court of withdrawal, for example, where

a substitution of counsel is being made with the consent of the client. The Commission recommends following the practice of several states that have added the proposed first sentence in order to remind lawyers of their obligations under court Rules.

4. Paragraph (d): Add reference to return of unearned fees and unexpended advanced expenses

This change corresponds to the change in Rule 1.15, which requires lawyers to segregate advanced fees and expenses in a client trust account.

COMMENT:

[1] The additional material addresses the question of when a representation is completed and cross references other Rules, including those in which the services are limited in scope or intended to be short term in nature. No change in substance is intended.

[3] Three changes are proposed. None of them is substantive. The first proposal is to add a sentence regarding the possibility that a court may require either approval or notice before a lawyer withdraws from pending litigation. The second is to substitute "request" for "wish" for reasons of style. The third is to add a cross reference to Rules 1.6 and 3.3 regarding any colloquy with a court requesting an explanation for the lawyer's request to withdraw.

[6] These changes are proposed in light of the changes made in Rule 1.14.

[7] The proposed change tracks the proposed change to paragraph (b)(4).

[9] The Commission recommends adding a cross reference to Rule 1.15 on client property. It also recommends that the last sentence be deleted because its meaning is unclear.

b. Detailed discussion of reason for variance from ABA Model Rule (if any).

The Committee determined that the general nature of the guidance about retaining client papers in MR paragraph (d) and Comment [9] required additional information on this issue in proposed Comment [9] and Comment [10].

Committee proposal adopted without change. Order 2009-05, eff 7-15-09.